

BEFORE THE  
**Federal Communications Commission**

WASHINGTON, D. C. 20554

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**JUL 15 1992**

FEDERAL COMMUNICATIONS COMMISSION  
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In re Applications of )

CRYSTAL CLEAR COMMUNICATIONS, INC. )

THE RADIO MINISTRIES BOARD OF )  
VICTORY CHRISTIAN CENTER )  
ASSEMBLY OF GOD, INC. )

For a New FM Station, )  
Seelyville, Indiana )

To: The Review Board

MM Docket No. 92-62

File No. BPH-901214MA

File No. BPH-901217MJ

**OPPOSITION TO APPEAL**

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July 15, 1992

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## **OPPOSITION TO APPEAL**

The Radio Ministries Board of Victory Christian Center Assembly of God, Inc. ("Board"), by counsel, hereby opposes the Appeal of Crystal Clear Communications, Inc. ("Crystal") filed July 8, 1992,<sup>1</sup> as follows:

Crystal's excuse for not timely filing its Notice of Appearance ("Notice") is that "apparently" the Notice was dispatched to a courier for May 4 delivery, but delivery was not made. Crystal's failure to corroborate this story, or to identify the courier, in itself, justifies its dismissal.

Even if Crystal had supported its story, it would not have justified its late filing, since the Commission has warned applicants not to rely on couriers for delivery of time-sensitive filings. See Caldwell Television Associates, Ltd., 94 FCC 2d 69 (1983); Public Notice, 58 RR 2d 1706 (1985). Those rulings are not limited to the cut-off date for initial filing of an application, as Crystal maintains. See, e.g., Kennebec Valley Television, Inc., 65 RR 2d 149 (1988) (denying consideration of untimely "decisive" B cut-off amendment, noting delays by couriers do not justify waiver of filing deadline).<sup>2</sup>

Although Crystal suggests its lack of diligence was due to prior counsel's "inattention," it provides neither support nor details as to how that was so. Moreover, the Commission has warned applicants to choose counsel, their agent, with care, knowing they will suffer the consequences if counsel does not rigorously prosecute their application. Albert E. Gary, 4 FCC Rcd 4112, 4113 and n. 1. (Rev. Bd. 1989).

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<sup>1</sup> In its July 7, 1991 Reply to Opposition to Motion to Dismiss, Board criticized Crystal's decision not to file its appeal with its motion for leave to file it late, noting Crystal's failure to file its appeal by June 18 eliminated the possibility of meeting the August 26 hearing date. Crystal's decision to file its appeal now, "to eliminate any further delay or prejudice" does not eliminate that prejudice. There still is insufficient time to reschedule and attend a prehearing conference, conduct discovery on the standard comparative and any added issues (Crystal has admitted it does not have a transmitter site) and prepare for hearing in a month or less.

<sup>2</sup> An applicant also must show all reasonable steps were taken to minimize further delay. Public Notice, 58 RR 2d at 1707. Crystal's claim it did not learn of nondelivery of its Notice until May 16, 1992, is unsupported. If the story is true, it means that although Crystal asked for a stamped-in copy of its Notice, when no such copy was forthcoming during the two weeks after the Notice was due, Crystal did not check on delivery. Moreover, Crystal then waited another ten days to move for acceptance of its late Notice.

See also, Carroll, Carroll and Rowland, 4 FCC Rcd 7149, 7151 (Rev. Bd. 1989) (applicants not immunized against sanctions merely because they rely on counsel; otherwise administrative and procedural havoc would ensue). Crystal maintains such cases are distinguishable because, it argues, there was no pattern of misconduct here and it diligently secured new counsel.<sup>3</sup> Neither statement is accurate.

First, the late filing of its Notice was not an isolated transgression.<sup>4</sup> Crystal's integration statement also was late filed,<sup>5</sup> and it did not produce documents on May 11, 1992,<sup>6</sup> as required by Section 1.325(c) and the HDO, ¶12.<sup>7</sup> Moreover, Crystal did not immediately secure new counsel. It was on notice by mid-

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<sup>3</sup> In support, it cites Maricopa County Community College District, 4 FCC Rcd 7754 (Rev. Bd. 1989). Maricopa involved an attorney who, after diligently prosecuting an application for some time, did not timely file hearing exhibits because, he said, he planned to kill himself. The applicant, which hired new counsel within four business days, was not allowed to respond in writing to a motion to dismiss. The Review Board reinstated the application, noting the applicant should have been allowed to respond formally to the motion to dismiss, it had previously diligently prosecuted its application, it had promptly retained new counsel, and there was not a pattern of dilatory conduct. Crystal's dilatory actions began with its first filing after the HDO was issued, and continued with other late filings. As shown herein, it did not diligently secure new counsel. Moreover, Crystal had ample opportunity to respond to the motion for dismissal of its application, and to document its justification. Indeed, had it believed Mr. Emert to have been "inattentive," it should have retained new counsel to prepare that important pleading. Likewise, Crystal's situation is unlike the Horizon Community Broadcasters, Ltd., 102 FCC 2d 1267 (Rev. Bd. 1982), applicant which filed its proposed findings four workdays late when the disc upon which those findings had been typed was erased just before filing. The ALJ dismissed the application without allowing the applicant to explain the late filing. The Review Board reinstated it. Here, in contrast, Crystal relied upon the guarantee of a courier service, despite Commission warnings that such reliance is risky. Finally, the facts here bear no resemblance to those in John Spencer Robinson, 5 FCC Rcd 5542 (Rev. Bd. 1990), where an applicant filed its post-designation notice before the deadline, but misunderstood instructions from the FCC as to rules on new filing fees.

<sup>4</sup> Crystal's repeated transgressions make this case dissimilar to the applicant's inadvertent failure to timely file a relatively insignificant amendment in Cannon Communications Corp., 6 FCC Rcd 570 (1991). Likewise, Crystal's citation to Nancy Naleszkiewicz, 7 FCC Rcd 1797 (1982), is misplaced. That case involved a single non-broadcast applicant designated for hearing on a character issue, a fact the Commission cited as a justification for acceptance of its late-filed notice of appearance.

<sup>5</sup> Had Crystal not been dismissed, Board would have moved for dismissal of the integration statement or, alternatively, for rejection of any hearing exhibits based upon it.

<sup>6</sup> As Board noted in earlier pleadings, it did not initiate discovery through document production since it knew Crystal had not filed its Notice and was ripe for dismissal.

<sup>7</sup> Moreover, although Crystal has admitted it knew of the loss of its transmitter site by mid-April 1992, as of the June 11 dismissal of its application it still had not filed a §1.65 amendment reporting that fact.

May 1992 that its Notice had been filed late since Board's Motion to Dismiss -- which was sent not only to Crystal's counsel, but also to Crystal's president -- was filed May 11, 1992. If attorney "inattention" had caused the late filing of its Notice, Crystal should then have secured new counsel -- but it did not. Moreover, Board's June 4, 1992 reply pleading documented Crystal's failures to timely file its integration statement and exchange documents. Still Crystal did not retain new counsel, waiting until June 22, ten days after its application was dismissed and several days after the deadline for appealing that dismissal had passed.

Crystal also argues that because it paid its hearing fee with a document titled "Notice of Appearance" on July 15, 1991, its failure to timely file a post-designation Notice is a minor technicality. But Crystal's fee was only "on deposit" with the FCC, since failure to timely file a post-designation notice allows an applicant to obtain a refund of the fee. See Section 1.1111(c)(2). Crystal's July 15 "notice" did not toll that opportunity for a refund because it was legally irrelevant: Crystal could not affirm any intent to meet issues and appear on the date set for hearing when neither the HDO specifying the issues nor the prehearing order setting the hearing date had been adopted. Moreover, under §1.221(c), the notice must be "filed with the Commission." Thus, even after serving copies on the ALJ and the other parties, Crystal could have sought a refund.

Crystal maintains the standard governing its dismissal is not Caldwell and its progeny, but Comuni-Centre Broadcasting, Inc. v. FCC, 856 F.2d 1551 [65 RR 2d 457] (D.C. Cir. 1988). Even assuming that to be so, its dismissal must be upheld. In Comuni, the appeals court suggested four factors to be considered -- even when all four are not present -- in reviewing dismissal.<sup>8</sup> First is the justification for noncompliance. Crystal states "the justification for the [Notice's] late filing is unchallenged." Ludicrous. Board could hardly challenge a story which has never even identified the primary actor -- the anonymous courier. Crystal did not meet its burden of justifying its untimely filing.

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<sup>8</sup> The Court said that "among the factors appropriate for consideration" are the four discussed herein. 65 RR 2d at 459. It did not hold that all four factors must be present.

Other factors to consider are whether there is prejudice, any "burden" on the administrative system, or a need to deter future misconduct. Crystal's claim there is no burden or prejudice ignores the fact that, if its application is reinstated, the procedural dates have been nullified, wasting the Commission's limited resources, and, as Crystal concedes (Appeal, n.1), prejudicing Board<sup>9</sup> and the public awaiting new service.

Moreover, effective and expeditious dispatch of the FCC's responsibility to provide new service to the public is, in itself, an integral part of the public interest. CSJ Investments, Inc., 5 FCC Rcd 7653, 7654 (1990) (citation omitted). See also Proposals to Reform the Commission's Comparative Hearing Process, 6 FCC Rcd 157 (1990), affirmed, 6 FCC Rcd 3403 (1991) (undue delay in selecting applicants disserves public by delaying new service and exacting economic toll on the government, taxpayers and the applicants). Failure to abide by the Commission's rules eviscerates those rules and promotes gamesmanship, at great expense to the public interest. Moreover, Crystal did not voluntarily disclose that its filings were untimely.<sup>10</sup> That fact and the other circumstances here, including repeated transgressions, raise a question of gamesmanship and, at the least, demonstrate disregard for the Commission's processes.

The Commission will not indulge applicants' temporizing activities; it has placed a greater emphasis on providing efficient, expeditious service to the public. The ALJs are empowered with broad discretion to implement those objectives. Albert Gary, *supra*, at 4113. In light of the facts here (and the directive of Section 1.221(c) that where a notice is untimely, the application "will be dismissed")<sup>11</sup> the ALJ did not abuse his discretion in dismissing Crystal's application. Crystal's additional failure to diligently seek new

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<sup>9</sup> Board knows no applicant has a vested interest in its competitor's dismissal but, in fact, it has suffered substantial prejudice from Crystal's dilatory actions, incurring considerable expense in ferreting out the undisclosed filing failures and bringing them to the Commission's attention. Moreover, several pleadings were generated only because, after being dismissed for not meeting filing deadlines, Crystal missed its appeal deadline.

<sup>10</sup> Its Notice was dated May 4, 1992. Had Board not reviewed the Commission's files, the fact the Notice was late filed likely would not have been disclosed. (Crystal maintains it did not discover the filing was untimely until May 16, but that story is uncorroborated.) Similarly, it was only in the preparation of its June 4, 1992 reply pleading that Board discovered Crystal's integration statement also was not filed on the date set forth in that document.


<sup>11</sup> See also CSJ Investments, 5 FCC Rcd at 7654, acknowledging this directive.

counsel (if, indeed, attorney "inattention" was involved) further supports upholding its dismissal. Accordingly, Crystal's Appeal should be denied. Compare Juan Galiano, 5 FCC Rcd 6442 (1990) (unsupported excuse for late filing rejected), recon. denied, 6 FCC Rcd 895 (1991); CSJ Investments, supra.

WHEREFORE, in light of the foregoing, the appeal filed by Crystal Clear Communications, Inc. should be DENIED.

Respectfully submitted,

THE RADIO MINISTRIES BOARD  
VICTORY CHRISTIAN CENTER  
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July 15, 1992

**CERTIFICATE OF SERVICE**

I, Mary Weiss, hereby certify that on this 15th day of July, 1992, copies of the foregoing  
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